**REPORTABLE**

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NO. 157 OF 2007**

% **Date of Decision** : 10th July, 2007.

RASEEL G. ANSAL .... Appellant.
Through Mr. Arvind K. Nigam & Mr. Arunabh Chowdhury, Advocates.

VERSUS

SATYA SHEEL .... Respondent.
Through Mr. Parag Tripathi, Sr. Adv. with Ms. Priya Kumar, Advocate.

**CORAM:**

**HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE**
**HON'BLE MR. JUSTICE SANJIV KHANNA**

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

**SANJIV KHANNA, J:**

1. The respondent, Mr. Satya Sheel had filed a suit for perpetual injunction in respect of 9 biswas of land located in revenue estate of village Sultanpur, Tehsil Haus Khas, New Delhi. The suit was filed against Mr. Ashwani Agnimitra, who it is admitted in the plaint was owner of land adjacent to the land owned by the respondent. The land made subject matter of the suit and

the dispute is a passage or '*raasta*'.

2. The suit was filed on 5th May, 2003 and written statement to the said suit was filed by Mr. Ashwani Agnimitra on 4th August, 2003 to which a replication was filed on 30th April, 2004. A local commissioner was also appointed by the Court and his report is on record. The documents stand filed by both the respondent and Mr. Ashwani Agnimitra.

3. The suit was fixed for framing of issues and arguments on interim application before the learned Single Judge on 5th May, 2006. On the said date, request for adjournment was made on the ground that there was change in the counsel for the defendant Mr. Ashwani Agnimitra. The matter was adjourned to 2nd August, 2006 for arguments on the interim application and framing of issues.

4. Order dated 2nd August, 2006 passed by the learned Single Judge records that no one was present on behalf of Mr. Ashwani Agnimitra and accordingly the defendant was proceeded ex parte. The respondent herein being the plaintiff was required to file evidence by way of affidavit.

5. The appellant herein Ms. Raseel G. Ansal thereafter on 5th December, 2006 filed two applications before the learned Single Judge being IA No. 13573/2006 for being impleaded as

a party to the suit under Order I, Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code) and IA No. 13572/2006 under Order IX, Rule 7 of Code for recalling and setting aside of the ex parte order dated 2nd August, 2006. The first application being IA No. 13573/2006 though filed under Order I, Rule 10 of the Code was treated as one under Order XXII, Rule 10 of the Code and stands allowed vide order dated 17th April, 2007. By the same order IA No. 13572/2006 under Order IX, Rule 7 of the Code stands dismissed by the learned Single Judge and this order is made subject matter of the present appeal.

6. The appellant claims to have purchased property/land belonging to Mr. Ashwani Agnimitra vide sale deed dated 28th November, 2005, which was registered with the Sub-Registrar on 14th February, 2006. It was stated in the application for setting aside of the ex parte order dated 2nd August, 2006 that the change in the counsel had taken place pursuant to execution of the sale deed. It was also stated that there were talks of amicable settlement on the subject matter of the suit between the appellant and the respondent. This it is submitted was the reason for some delay in moving the application for impleadment and the application under Order IX, Rule 7 of the

Code for recalling the ex parte order dated 2nd August, 2006. In paragraph 8 of the application for recalling of the ex parte order dated 2nd August, 2006, it is mentioned that on the said date, the suit was directed to be listed on 6th November, 2006 and the said date was noted by the new counsel and intimated to the appellant but in the order sheet it was recorded that the matter would be listed on 6th September, 2006. In this regard counsel for the appellant had drawn our attention to the cause list dated 6th November, 2006 in which the suit in question was also shown but as per note was deleted. We need not enter into this controversy. However, both the parties, i.e. the appellant and the respondent, admit that on 2nd August, 2006 Mr. Arunabh Choudhary, Advocate had appeared before the learned Single Judge and had asked for time for filing of vakalatnama though his presence and request is not recorded in the order. In the reply filed by the respondent to the application under Order IX, Rule 7 of the Code, the respondent has admitted that the order dated 2nd August, 2006 was passed in the presence of the counsel for the appellant. It may be relevant to state here that the appellant had also executed power of attorney/vakalatnama dated 18th May, 2006, which was filed in the Court on 23rd August, 2006.

7. Under Order IX, Rule 7 of the Code, on good cause being shown for previous non-appearance, an ex parte order can be recalled or set aside. The said provision is a part of procedural law and is designed to do substantial justice. The said provision is not on penal enactment for punishing parties. Laws of procedure are meant to effectively regulate, assist and aid the object of doing substantial justice and not to take away the right to properly and effectively defend proceedings. At the same time, courts have to be cautious on not extending an helping hand to an erring party, which seeks to deliberately and intentionally delay proceedings. Unscrupulous parties cannot be allowed to take advantage of misplaced sympathy and thus perpetuate injustice. A balance has to be struck.This aspect has been highlighted in two judgments of this Court in ***Ram Lal Kathuria versus Shiv Kumar Sharma*** [82 (1999) DLT 464] and ***Subhash Kumar versus Delhi Development Authority***, [1999 II AD (Delhi) 817]. In the case of Ram Lal Kathuria (supra), the applicant therein had earlier filed a writ petition, which was rejected. Review application filed in the said writ petition was also dismissed. The applicant thereafter filed several suits, which too met with the same fate. Thereafter, the contesting party filed a suit claiming possession and mesne

profits in which the applicant therein was served but failed to appear and an application for setting aside of the ex parte order was filed after nearly 10 months and the same was rejected. This Court specifically noticed the past conduct of the applicant therein and history of previous litigation between the parties. It was noticed that the stand taken by the applicant therein about his advocate being seriously ill and not in the country was incorrect. Similarly, in the case of Subhash Kumar (supra), the order records the applicant therein had deliberately absented himself on several dates when the case was fixed for trial and did not cross-examine witnesses in spite of repeated opportunities. The application for setting aside of the ex parte order dated 4th July, 1994 was filed only on 25th March, 1996. Paragraph 3 of the said order reveals that the counsel for the applicant had made a statement on 14th September, 1994 that she would be moving an application for setting aside of the ex parte order but the said application was moved after substantial delay only on 25th March, 1996. In these circumstances, the court held that the applicant had deliberately and intentionally sought to delay and prolong the proceedings and showing any indulgence would not subserve the interest of justice and equity and, therefore, refused to set the clock back. These cases

have to be distinguished from cases where defaults are made by the parties or their counsel due to lack of knowledge and understanding of law and procedure and other mistakes and errors. To err is human and when just cause is shown, the same can be condoned but an attempt to stall and delay proceedings deliberately and consciously has to be dealt with differently. These cases cannot be equated with mala fide defaults made with ulterior motives to prolong the proceedings and delay the final outcome.

8. The present case in our opinion falls in the category wherein the appellant has committed default in failing to file power of attorney on or before 2nd August, 2006. However, we find that before the said date the appellant had already executed the power of attorney on 18th May, 2006. Strangely this power of attorney on behalf of the appellant was not filed, though counsel was appearing in the Court and getting instructions from the appellant. Learned counsel for the appellant could not have filed power of attorney on behalf of Mr. Ashwani Agnimitra, who had sold his property to the appellant. There was delay in filing of the application for impleadment on behalf of the appellant. The application was filed under the wrong provision i.e., Order I, Rule 10 of the Code and not under the provisions of Order XXII, Rule 10 of the Code. Perhaps the counsel for the appellant was not fully aware of the relevant statutory provisions and steps to be taken. The said applications were filed on 5th December, 2006

within about four months of the order dated 2nd August, 2006, when the appellant was proceeded ex parte. The appellant has sought to explain the delay the proceedings by stating that there were talks of settlement between the appellant and the respondent. This fact is denied by the respondent and, cannot be resolved and decided without evidence. We also find that the order sheet reveals that Mr. Ashwani Agnimitra was regularly appearing in the suit and contesting the same. Written statement to the suit was filed immediately after service on 4th August, 2003 and in fact the respondent thereafter took considerable time to file replication, which was filed on 30th April, 2004. The counsel for the appellant started appearing in the matter after the sale deed was registered on 14th February, 2006 as a counsel for Mr. Ashwani Agnimitra and his presence is recorded on 24th March, 2006, when statement of counsel for both the parties were recorded by the Joint Registrar that they do not wish to carry out admission and denial of documents. The counsel for the appellant also appeared for and on behalf of Mr. Ashwani Agnimitra on 5th May, 2006 and 2nd August, 2006. It is also admitted by the counsel for the respondent that on 2nd August, 2006 counsel for the appellant was present in the Court but his presence was not recorded as vakalatnama was not on record. Keeping these aspects in mind, we feel that substantial justice will be done by directing the appellant to pay cost of Rs.50,000/- to the respondent for the default on her part in failing to file vakalatnama on or before 2nd August, 2006 and thereafter causing delay of about four months in moving application for substitution and setting aside order dated 2nd August, 2006. It may be relevant to state here

that after the order dated 2nd August, 2006 was passed, nothing substantial has transpired except that the respondent has filed affidavit by way of evidence. Lapse and default on the part of the appellant cannot be termed as mala fide or deliberate. The appellant had nothing to gain, having purchased the property for consideration.

9. It may be noticed here that the appellant was required to file an application under Section 5 of the Limitation Act for the delay in moving the application under Order IX, Rule 7 of the Code and no such application was filed. However, we are not inclined to dismiss the appeal on this ground alone. We find that necessary averments and facts explaining the delay in moving the application under Order IX, Rule 7 of the Code have been mentioned in IA No. 13572/2006. It may also be noticed that the application under Order I, Rule 10 of the Code (treated as one under Order XXII, Rule 10 of the Code) for substituting the appellant in place of the original defendant was also allowed vide order dated 17th April, 2007,i.e. the impugned order by which application under Order IX, Rule 7 of the Code was dismissed. Thus, the appellant became a party w.e.f. 17th April, 2007.

10. In view of the above, we allow the present appeal and set aside the order dated 17th April, 2007 dismissing IA No. 13572/2006, subject to payment of cost of Rs.50,000/- by the appellant to

the respondent within a period of three weeks from today. The matter will be listed before the learned Single Judge for framing of issues on 6th August, 2007. The appellant will be given only one opportunity to file affidavit by way of evidence. The appellant will also not seek any adjournment to cross-examine the witnesses of the respondent. Subject to payment of cost of Rs.50,000/- within three weeks and with the above directions, we set aside the ex parte order dated 2nd August, 2006 and allow the present appeal.

**(SANJIV KHANNA)**
**JUDGE**

**(DR. MUKUNDAKAM SHARMA)**
**CHIEF JUSTICE**

**JULY 10, 2007**
**VKR**